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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

AMOCO PRODUCTION COMPANY,
on behalf of itself and the class it represents,
Petitioners,

v.

SOUTHERN UTE INDIAN TRIBE,

and

BRUCE BABBITT, Secretary of the
United States Department of the Interior, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

BRIEF FOR RESPONDENT SOUTHERN UTE INDIAN TRIBE

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QUESTION PRESENTED

Whether, in reserving to the United States "coal" in lands patented under the 1909 and 1910 Coal Lands Acts, 30 U.S.C. §§ 81, 83-85, while passing the surface land and all other minerals (including natural gas) to the patentee, Congress reserved only the solid rock fuel commonly known as "coal," but not natural gas in coal formations.

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BRIEF FOR RESPONDENT SOUTHERN UTE INDIAN TRIBE

STATEMENT OF THE CASE

Petitioners seek to overturn a decision of the Tenth Circuit holding that Respondent owns coalbed methane, a constituent of its coal. In passing the Coal Land Entry Acts of 1909 and 1910, Congress permitted nonmineral patenting of lands classified as valuable for coal, but retained federal ownership of the underlying coal beds. Act of March 3, 1909, ch. 270, 35 Stat. 844 (codified at 30 U.S.C. § 81) ("1909 Act"); Act of June 22, 1910, ch. 318, 36 Stat. 583 (codified at 30 U.S.C. §§ 83-85) ("1910 Act") (together "the Acts").[1] The limited patents issued to nonmineral entrymen under the 1909 Act, on which Congress modeled the 1910 Act, reserved to the United States "all coal in said lands, and the right to prospect for, mine, and remove the same." Both Acts provided for the subsequent federal disposition of the reserved "coal deposits" and the associated development rights. As a result of congressionally authorized restoration in 1938, the Southern Ute Tribe ("Tribe") owns the coal deposits located under approximately 200,000 acres of land within the Southern Ute Indian Reservation ("Reservation") and the related prospecting, mining and removal rights Congress reserved in the Acts. Pet. Br. 1.[2]

By virtue of the Acts' reservations, the Tenth Circuit found that the Tribe owns the coalbed methane ("CBM")

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[1] The Appendix to Petition for Certiorari contains a copy of the codified versions of the Acts (Cert. Pet. App. 133a-136a). The Appendix to Respondent's Brief in Opposition sets forth the Acts as originally enacted (R. App. 1a-5a).

[2] The boundaries of the Reservation, confirmed by Congress in 1984, include the lands at issue in this case, which are a remnant of the aboriginal lands of the confederated Ute bands initially recognized by the United States in 1868. *See* Act of May 21, 1984, Pub. L. No. 98-290, § 3, 99 Stat. 201.

contained within and commercially extracted from its coal by Petitioners.[3] In contrast, Petitioners deny that coal contains gaseous or liquid constituents, and also suggest that even the solid components of coal not valuable as combustible fuel are not "coal." Petitioners thus claim that they own the CBM, the inherent moisture and any other non-carbon substances extractable from the Tribe's coal because Congress did not reserve those substances under the Acts. Pet. Br. 36 n.18.

The Tenth Circuit found the term "coal" ambiguous and resolved that ambiguity in the Tribe's favor in accordance with the long-standing rule of statutory contruction interpreting ambiguities in public land grants in favor of the sovereign. The Tribe maintains that the Acts as a whole confirm that Congress reserved coal in its complete, unmined and natural condition, inclusive of inherent gases, liquids and all organic and inorganic contituents, and that the statutory term "coal" is ambiguous only if viewed in isolation.

In reserving "coal deposits," Congress relied upon the United States Geological Survey ("U.S.G.S.") classification system, which identified valuable coal strata by depth, thickness and quality. Congress viewed coal deposits as identifiable property boundaries within which the subsequent coal estate owner would receive exclusive rights, including the right to dispose of or ventilate the CBM required for development of the coal. Indeed, the CBM at issue in this case is indisputably a part of the coal beds identified by the U.S.G.S., even if not falling within the novel and impractical definition of "coal" that Petitioners promote. As owner of the "coal deposits," the Tribe possesses the right to invade the coal beds for the purpose of commercial

[3] CBM refers to the extractable substances contained within the Tribe's coal, which after removal assume a gaseous physical state under conditions of surface temperature and atmospheric pressure.

extraction of substances, such as CBM, contained within the "coal deposits."[4]

Origin of this Litigation. The Tribe generally does not disagree with the Petitioners' characterization of the facts that led to institution of this litigation. However, the Tribe strongly disagrees with Petitioners' description of the opinion of the Solicitor, *Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits,* No. M-36935, 88 Interior Dec. 538 (1981) ("1981 Solicitor's Opinion") (Cert. Pet. App. 140a-159a). *See* Pet. Br. 13-14. Rather than being the result of careful examination of the Acts, the 1981 Solicitor's Opinion was the result of Amoco's ex parte efforts to obtain the reversal of certain U.S.G.S. decisions denying applications for permits to drill CBM wells under federal oil and gas leases. C.A. App. Vol. 9, at 2038, 2039 (C.A. Doc. Entry 3/28/95 [843705]). Petitioners also fail to acknowledge that title opinions written in anticipation of drilling into tribal coal deposits regularly warned Amoco and other companies that, despite the 1981 Solicitor's Opinion, ownership of CBM remained uncertain (Cert. Pet. App. 80a n.20). Beginning in the late 1980s, the Tribe publicly made very clear that it disagreed with the applicability of the 1981 Solicitor's Opinion within the Reservation boundaries. Commencing in 1988, the Department of the Interior approved 162 communitization agreements that oil and gas companies signed, and which expressly reserved the Tribe's CBM rights. C.A. App. Vol. 9, at 2072, 2073 (C.A. Doc. Entry 3/28/95 [843705]). Petitioners' assertion that they relied in good faith on the 1981 Solicitor's Opinion in commencing CBM extraction

[4] As the appeals court observed, "At issue here is the ownership of CBM trapped in and produced from the coal reservoir" (Cert. Pet. App. 18a n.8). The Tribe does not claim ownership of natural gas located in non-coal strata, even though in a prior geologic era it may have been excess CBM generated and expelled by slowly maturing coal deposits.

on the Reservation obscures the fact that they were fully aware of the continuing questions related to CBM ownership and proceeded with extraction nevertheless.

Historical Disposition of Public Lands. As westward expansion proceeded following the Civil War and for half a century thereafter, Congress maintained a consistent national policy prohibiting agricultural settlers from obtaining patents to lands known to contain valuable minerals. Desert Land Act of March 3, 1877, ch. 107, § 2, 19 Stat. 377 (codified at 43 U.S.C. § 322) ("Desert Land Act"); Act of June 21, 1866, ch. 127, § 1, 14 Stat. 67 (codified at 43 U.S.C. § 201, *partially repealed by* Act of October 21, 1976, Pub. L. No. 94-579, 90 Stat. 2787) ("Mining Act of 1866"); Act of July 1, 1864, ch. 205, § 1, 13 Stat. 343 ("Coal Lands Sales Act of 1864"); Act of May 20, 1862, ch. 75, §§ 1, 2, 12 Stat. 392 (codified at 43 U.S.C. §§ 161-62, *partially repealed by* Act of October 21, 1976, Pub. L. No. 94-579, 90 Stat. 2787) ("Homestead Act"); Act of September 4, 1841, ch. 16, § 10, 5 Stat. 453, 455-56. Lands containing coal were not subject to agricultural entry. *Mullan v. United States,* 118 U.S. 271, 277 (1886); Decision of Commissioner General Land Office (Sept. 22, 1908), J.A. Vol. I, at 285-89.

By 1909, Congress had established a system of public land disposition that turned upon the classification of land, the principal categories of which were coal, non-coal minerals and agriculture. Whether under the Desert Land Act, the Act of March 3, 1873, ch. 279, 17 Stat. 607 (codified as amended at 30 U.S.C. §§ 71-76) ("Coal Lands Sales Act of 1873"), the General Mining Law of 1872, or the Homestead Act, the successful patentee received fee simple absolute title. In passing the 1909 and 1910 Acts, Congress for the first time permitted agricultural entrymen to receive limited patents to designated coal lands, subject to a reservation of the coal estates for

future disposition. Until passage of the Stock-Raising Homestead Act of 1916, which reserved all minerals from patents to agricultural land, land classification determined the vehicle by which agricultural entrymen, coal land entrymen or non-coal mineral claimants could obtain fee simple title to public land. Act of December 29, 1916, Pub. L. No. 64-290, ch. 9, 39 Stat. 862 ("SHRA").

Historically, Congress disposed of coal lands separately from lands valuable for other minerals and prescribed minimum prices for the fee simple title to coal land acreage that were higher than those assessed for other public lands. Coal Lands Sales Act of 1873, § 1; Coal Lands Sales Act of 1864, § 1. Under President Theodore Roosevelt's administration, the Department of the Interior increased by up to 1500 percent the price per acre for coal land acreage. *Coal-Land Laws and Regulations Thereunder,* 35 Pub. Lands Dec. 665 (1907); *Coal Lands—Character of Land—Evidence,* 34 Pub. Lands Dec. 194 (1905); *Sales of Coal Lands—Rules and Regulations,* 1 Pub. Lands Dec. 687 (1882); *Classification and Valuation of Coal Lands,* 37 Pub. Lands Dec. 653 (1909) (Cert. Pet. App. 137a).

Two years after passage of the first Coal Lands Sales Act of 1864, Congress enacted the intial comprehensive law addressing disposal of hard rock, non-coal minerals. Act of July 26, 1866, ch. 262, 14 Stat. 251. Supplementary legislation embodied in the Placer Mining Act of 1870 and the General Mining Law of 1872 authorized the patenting of all public lands containing "valuable mineral deposits" other than coal deposits, either through lode location or placer claim. Act of May 10, 1872, ch. 152, 17 Stat. 91; Act of July 9, 1870, § 12, ch. 235, 16 Stat. 217. The mineral patentee, like the coal land patentee, received fee simple absolute title.

At the turn of the century, oil and gas were viewed as associated minerals treated under the general heading of "petroleum." The Petroleum Lands Act of 1897 confirmed that placer patenting was permissible for petroleum-bearing lands. Act of February 11, 1897, ch. 216, 29 Stat. 526. Properly classified coal lands were not available for gas placer patenting. The Department of the Interior strictly applied this well-established rule, which demonstrates that CBM was not considered petroleum. *See, e.g., Ohio Oil Co. v. Kissinger,* 60 Interior Dec. 342 (1949); *Ohio Oil Co. v. Kissinger,* 58 Interior Dec. 753 (1944); *H. W. Rowley,* 58 Interior Dec. 550 (1943).

The U.S.G.S. Classification System and Study of Coal. The U.S.G.S. classification system and coal lands designation practices are the underpinnings of the Acts. Prior to the creation of the U.S.G.S., the General Land Office supervised the classification and surveying of the public lands. Act of March 3, 1849, ch. 108, 9 Stat. 395; *see generally* C. ALBERT WHITE, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM (1926-1991). Government exploration and surveying of western lands, by such notable personages as Major John Wesley Powell, revealed not only the unparalleled natural resources of the West, but also a tremendous need for a governmental inventory of the public's vast holdings. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 419-34 (1968) ("Gates"); BENJAMIN H. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 500-01 (1924). In 1879, Congress created the U.S.G.S. and assigned it responsibility for "the classification of the public lands and examination of the Geological Structure, mineral resources and products of the national domain." Act of March 3, 1879, ch. 182, § 1, 20 Stat. 377, 394 (codified as amended at 43 U.S.C. § 31).

Classification of coal land required extensive surface reconnaissance, geological mapping and coal sampling. *See, e.g.,* Arthur J. Collier, *Geology and Coal Resources*

of the Cape Lisburne Region, Alaska, U.S.G.S. Bulletin 278, H.R. Doc. No. 59-826, at 5 (1906). The evolution and increasing sophistication of U.S.G.S. geological reconnaissance dramatically redefined the evidence needed to support coal land designation. *See Coal Lands—Character of Land—Evidence,* 34 Pub. Lands Dec. 194 (1905) (Secretary of the Interior directing Commissioner of the General Land Office to accept extrinsic evidence of coal beds rather than actual exposure of commercially valuable coal on each tract). *Compare Diamond Coal & Coke Co. v. United States,* 233 U.S. 236, 245-49 (1914), *and Colorado Coal & Iron Co. v. United States,* 123 U.S. 307, 325 (1887). This marked departure from prior land classification practices expanded the geographic area of coal lands and, accordingly, reduced the area available for agricultural entry. *See Lands Classified As Coal—Practice—Burden of Proof,* 36 Pub. Lands Dec. 215, 216 (1907) ("the conclusion must largely depend upon the geological formation of the lands in question . . . .").

Additionally, the scientific testing of coal samples for potential fuel value and the development of new coal utilization technologies widened the spectrum of coal deposits considered commercially valuable. *See* Act of February 18, 1904, ch. 160, 33 Stat. 15, 33 (authorizing the U.S.G.S. to evaluate different coals and "the most economic method for their utilization for different purposes . . . ."). For example, the invention of the "gas producer-generator" demonstrated that gases derived through coal distillation held great potential for future use in internal combustion engines. Marius R. Campbell, *Contributions to Economic Geology 1906, Part II—Coal, Lignite, and Peat,* U.S.G.S. Bulletin 316, H.R. Doc. No. 59-823, at 12 (1907), J.A. Vol. II, at 414 ("Campbell"). Between 1904 and 1910, the U.S.G.S. tested the fuel values of 195 samples of coal, including bituminous coals, lignites and peats from 28 dif-

ferent states. Robert H. Fernald, *The Status of the Gas Producer and of the Internal-Combustion Engine in the Utilization of Fuels* 16, U.S. Bureau of Mines, Technical Paper 9 (1912) ("Fernald"). The U.S.G.S. testing program also included elaborate analysis of the phenomenon by which coal holds occluded methane. Rollin T. Chamberlin, *Notes on Explosive Mine Gases and Dust*, U.S.G.S. Bulletin 383, H.R. Doc. No. 60-1538 (1909) ("Chamberlin"), J.A. Vol. II, at 415; *see also* Horace C. Porter & F. K. Ovitz, *The Escape of Gas From Coal*, U.S. Bureau of Mines, Technical Paper 2 (1911) ("Porter & Ovitz"), J.A. Vol. II, at 508. The efforts of the U.S.G.S. contributed to a comprehensive understanding of coal and influenced the coal land classification system.

Executive Withdrawal of Coal Lands From Entry. Congress passed the 1909 and 1910 Acts in direct response to administrative actions that substantially expanded the recognized coal lands of the United States and thereby reduced the amount of land available for homestead entry and patenting. Between July 26 and November 12, 1906, President Theodore Roosevelt authorized several Secretarial orders that removed approximately 66 million acres of western lands from all forms of entry. Gates at 725-29. As explained by President Roosevelt:

> I have temporarily withdrawn from settlement all the lands which the Geological Survey has indicated as containing, or in all probability containing, coal. . . . The coal, like the forests, should be treated as the property of the public and its disposal should be under conditions which would inure to the benefit of the public as a whole.

President Theodore Roosevelt's Sixth Annual Message (Dec. 3, 1906), *reprinted in* XV THE WORKS OF THEODORE ROOSEVELT 342, 362-63 (1926). The temporary withdrawals freed the U.S.G.S. from immediate development pressures while completing coal land determinations.

On December 17, 1906, the Roosevelt administration softened western political outcry by reopening the withdrawn lands to non-coal entry; however, if the U.S.G.S. subsequently classified those lands as coal land prior to patent, such entries would be for naught. *See* Gates at 727; Decision of Commissioner General Land Office (Sept. 22, 1908), J.A. Vol. I, at 285; *Nonmineral Applications For Lands Classified As Coal*, 38 Pub. Lands Dec. 181 (1909). Once classified as coal land, the exclusive authority for its disposition rested in the Coal Lands Sales Act of 1873, under which fee title was sold for increased acreage prices. *Classification and Valuation of Coal Lands*, 37 Pub. Lands Dec. at 653, 654 (Cert. Pet. App. 137a, 138a). The coal land conservation policy reflected by withdrawal and reclassification imposed obvious hardships on agricultural entrymen.

Coal, Coal Mining and Coal Utilization. Coal is found "'always as a thin sheet or stratum, extending through the hills as far as the hills extend, and inclosed between similar sheets of other kinds of rock.'" *Coal Lands—Character of Land—Evidence*, 34 Pub. Lands Dec. at 201 (quoting J. P. LESLEY, MANUAL OF COAL AND ITS TOPOGRAPHY). As Representatve Mondell observed in 1910:

> That coal extends under considerable areas of land is a matter beyond all dispute and controversy. Geological horizons, running unbroken through large areas of territory, carry with them unbroken, undiminished coal veins, so that it is not difficult to determine approximately the probable extent and area of coal lands.

45 CONG. REC. 6044 (1910) (statement of Rep. Mondell).

Coal is a sedimentary rock comprising a complex mixture of organic and inorganic substances resulting from the decomposition and compaction of plant material over geologic time. The process of progressive evolution of coal, known as coalification, produces a highly variable,

complex and heterogeneous mixture of compounds, which includes solids, liquids and gases. All coal contains predominately carbonaceous material and is readily combustible. *See generally* Affidavit of Stephen L. Bend, J.A. Vol. I, at 298-309 ("Bend Aff."); Affidavit of Jeffrey R. Levine, J.A. Vol. I, at 342-53 ("Levine Aff."); Affidavit of Dr. Harry Marsh, J.A. Vol. I, at 370-98 ("Marsh Aff."); THE COAL HANDBOOK (Robert A. Meyers ed., 1981), J.A. Vol. II, at 543-52; Jeffrey R. Levine, *Coal Composition, as Related to the Mode of Occurrence of "Coalbed Methane"* (1992), J.A. Vol. II, at 579-611 ("Levine Report").

Like other solids, such as wood, coal is an extremely porous substance. Most of the space or porosity within coal, however, cannot be seen because the dimensions of the pores are only slightly larger than small molecules. Marsh Aff. ¶ 3.10, J.A. Vol. I, at 376-77. The microporosity in coal results from the irregular stacking of some molecules during the coalification process. *Id.* Coal's micropores are not empty, however, but rather are filled with other molecules, such as CBM, generated during the coalification process. *Id.*, ¶ 4.3.1, J.A. Vol. I, at 379.[5]

The coalification process produces methane in coal. M. Duel & A. Kim, *Methane Control Research, Summary of Results, 1964-1980,* U.S. Bureau of Mines, Bulletin 687, at 25 (1984). "Methane is a component part of coal that is formed during the coalification process . . . ." M. G. Zabetakis et al., *Methane Control in United States Coal*

[5] Petitioners assert a recent study shows 60 per cent of coalbed methane "migrated *into* the coal seam." Pet. Br. 12 (citing Andrew R. Scott et al., *Thermogenic and Secondary Biogenic Gases, San Juan Basin, Colorado and New Mexico—Implications for Coalbed Gas Producibility,* 78 AAPG BULLETIN 1186, 1206 (1994). The article discusses the formation and migration of gases *within* the Fruitland coal formation and does *not* discuss or suggest that gas formed in noncoal geologic formations migrated into coal on the lands in question.

Mines—1972, U.S. Bureau of Mines, Information Circular 8600, at 6 (1973). "Methane is always present in coal . . . ." Ann C. Kim, *Estimating Methane Content of Bituminous Coalbeds From Adsorption Data,* U.S. Bureau of Mines, Report on Investigations 8245, at 1 (1977). Indeed, "bituminous coal," which is the rank of coal underlying the Tribe's Reservation, Levine Aff. ¶ 21, J.A. Vol. I, at 349-50, has been defined by the Department of the Interior as "[a] coal with a relatively high proportion of *gaseous constituents*; dark brown to black in color and burns with a smoky luminous flame." *A Dictionary of Mining, Mineral and Related Terms* 106, U.S. Bureau of Mines (1968) (emphasis added).

Coal also contains as part of its structure water generated during the coalification process. Marsh Aff. ¶ 3.11, J.A. Vol. I, at 377. The moisture inherently contained within the coal structure is universally recognized as a constituent of coal. Levine Report, J.A. Vol. II, at 582-83. The inherent moisture in coal can be removed after coal is mined; however, the Federal Government requires that the weight of mined coal include its inherent moisture content for certain tax purposes. *See Amax Coal Co. v. United States,* 128 F.3d 613 (7th Cir. 1997).

CBM and inherent moisture are held in coal in essentially the same manner. Marsh Aff. ¶ 4, J.A. Vol. I, at 378-81. Both are "grid-locked" within the macromolecular structure of the coal and cannot move to adjacent microporous sites because those micropores are also occupied. *Id.* The internal trapping mechanisms of coal render it relatively impermeable unless the coal is fractured. Affidavit of J. Craig Creel, ¶ 9, J.A. App. Vol. I, at 332 ("Creel Aff."). While coal contains some natural fractures, the porosity in coal consists principally of the micropores. Marsh Aff. ¶ 3.10, J.A. Vol. I, at 376-77. Measurable electric forces also bind the water and methane molecules to the surfaces of the macromolecular matrix;

however, the strength of the bond is greater for water than for CBM. Marsh Aff. ¶¶ 5, 6, J.A. Vol. I, at 381-96. The internal trapping and bonding of CBM within coal is known as adsorption or sorption. *Id.*

The disturbance of coal in the process of mining liberates CBM, a "hazardous, highly explosive gas . . . ." Affidavit of James T. Cooper ¶ 4, J.A. Vol. I, at 322 ("Cooper Aff."). Because of the dangers posed by liberated CBM, ventilation is one of the most important aspects of coal mining. Certainly without controlling CBM, coal could not be developed. *Id.* ¶ 6, J.A. Vol. I, at 323; VI ENCYCLOPAEDIA BRITANNICA 587 (11th ed. 1910); *see also* 30 U.S.C. § 863 requiring all coal mines to be ventilated). "[M]ethane continues to escape from coal even after it is mined, [and] steps must be taken to ensure adequate ventilation as the coal is transported . . . ." Cooper Aff. ¶ 7, J.A. Vol. I, at 323; Porter & Ovitz, J.A. Vol. II, at 510 ("gas escapes from coal not only during the breaking down of the coal in the mines, but also continuously for a long time after the coal is mined.").

Coal is a multi-purpose resource and not just a solid fuel. Marsh Aff. ¶ 7 ,J.A. Vol. I, at 396-97. From the 1880s until the mid-1960s, a substantial percentage of mined coal was used for the production of coal-gas or town-gas for both lighting and heating. *Id.* Prior to passage of the Acts, Congress authorized and demonstrated its awareness of improvements in the recovery of gases from mined coal of different varieties. Those improvements made lignite, a poor quality coal, valuable for power producing purposes. *Hearings on Coal Lands and Coal-Land Laws of the United States Before the House Committee on the Public Lands,* 59th Cong., 17-19 (1907) (testimony of Marius R. Campbell, U.S.G.S.) ("Campbell Testimony").

Liquefaction of coal produces liquid fuels such as gasoline, and coal-tar, a product of coking, has long been used

as the raw material in the chemical industry for a wide range of products. Marsh Aff. ¶ 7.1, J.A. Vol. I, at 396. The underground gasification of coal, which requires the ignition of a coal seam and the injection into the coal seam of steam, air or oxygen, is a recognized means for recovery of fuel gases from coal. Harry Perry, *The Gasification of Coal,* 230 SCIENTIFIC AMERICAN (1974), J.A. Vol. II, at 530. Methane is "among the first components to emerge" in underground gasification. *Id.*, J.A. Vol. II, at 532. The Department of the Interior recognizes underground coal gasification as permissible under federal coal leases—not federal oil and gas leases—even though the product of the process is gas. 30 C.F.R. § 206.264 (1997); *see In Situ Gasification of Coal,* No. M-36890, Opinion of Regional Solicitor, Denver (May 10, 1977), Gower Federal Service (Min) SO-1 (1979).

CBM Development. The storage of CBM in coal deposits differs from the storage of natural gas in conventional gas reservoirs. The great majority of CBM in a coal deposit is sorbed, whereas in a conventional gas reservoir the majority of gas exists in a free state. Matthew J. Mavor, *Overview of Coal Gas Reservoir Structure, Fluid Dynamics, and Completion Technology* (1993), J.A. Vol. I, at 188, 197. "In the unconventional coalbed methane reservoir of the Fruitland formation, a minimum of 95% of the gas exists in the sorbed state within the macromolecular matrix of the coal." Creel Aff. ¶ 6, J.A. Vol. I, at 331; *see also* Dudley D. Rice et al., *Coalbed Gas—An Undeveloped Resource, reprinted in The Future of Energy Gases,* U.S.G.S. Professional Paper 1570, at 389, 394-95 (1993). Because of the relative impermeability of coal, reductions of pressure in coal formations do not result in the free movement of fluids throughout the coal the way fluids move in conventional gas reservoirs. Creel Aff., Figure 2, J.A. Vol. I, at 337. To produce CBM commercially, it must diffuse from within the macromolecular

structure of coal, and that diffusion is governed by a law of physics generally not applicable to conventional gas reservoirs. *Id.* ¶¶ 4.1-9, J.A. Vol. I, at 329-32.

The general production profile of CBM wells also reflects the difference in size of the porosity occupied by CBM in coal when compared to the pore size in conventional gas formations. "A single methane molecule residing in a 1 millimeter-diameter pore [conventional reservoir] has the same 'aspect ratio' as a pin *point* (not a pin head) in a football field; whereas the microporosity in coal is barely larger than the sorbate molecules [CBM] that reside within it." Levine Report, J.A. Vol. II, at 610. "Pores in conventional reservoirs are as much as a million times larger than the 'pores' in coalbed reservoirs." Levine Aff. ¶ 28(D), J.A. Vol. I, at 353.

Commercial production of CBM involves three basic phases. The first step, drilling into the coal bed and installing production tubing, provides an open conduit through which reservoir fluids may move to the surface. The second stage, completion and stimulation, increases the interface between the well bore and the coal bed. *Id.* ¶¶ 26, 27, J.A. Vol. I, at 351-52. Because the natural fracture networks in the Tribe's coal beds are generally water-filled, pumping of the CBM wells, the third phase, serves to remove the coal bed water to facilitate CBM production. *Id.* ¶ 27, J.A. Vol. I, at 352. With equipment capable of removing 2,500 barrels of water per day from each CBM well, tremendous volumes of produced water must be disposed of, and evaporation facilities or underground injection wells have been developed for that purpose. William F. Clark & Tom Hemler, *Completing, Equipping, and Operating Fruitland Formation Coal-Bed Methane Wells in the San Juan Basin, New Mexico and*

Colorado (1988), J.A. Vol. II, at 553, 570, 573-75 ("Clark & Hemler").[6]

The two methods of CBM well completion are "open hole" and "cased hole." The open hole completion technique involves the injection of highly pressurized air and water to blow out a spherical cavity or room in the coal bed at the bottom of the well bore. *Id.*, J.A. Vol. II, at 555-57. "Up to 100 tons of solid coal may be removed from the well bore by this technique." Creel Aff. ¶ 14, J.A. Vol. I, at 334. In a cased hole completion, perforated well casing is cemented into the coal bed. Clark & Hemler, J.A. Vol. II, at 556, 560-61. Regardless of the completion technique, however, the continuous removal of small pieces of coal, known as "coal fines," which may vary in size from dust-like particles to chunks of coal, accompanies CBM production. *Id.*, J.A. Vol. II, at 562-64. CBM operators often stimulate the coal bed in order to expand the coal's natural fractures. The stimulation process includes the injection of thousands of gallons of stimulation fluid, such as hydrochloric acid, nitrogen foam, or gelled water into the coal. In attempting to prop the artificially stimulated fractures, producers introduce as much as 120,000 pounds of sand per well under high pressure into the coal bed. Creel Aff. ¶¶ 16, 17, J.A. Vol. I, at 334-35.

Nonconventional Fuels Tax Credit Program. Petitioners have claimed millions of dollars in federal income tax credits based upon the distinction between CBM production and conventional gas production. In association with enactment of the Crude Oil Windfall Profit Tax Act of

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[6] In recent months, the discovery of underground coal fires in dewatered portions of the Tribe's Reservation has triggered concern by La Plata County officials that the removal of water from coal has permitted oxidation and spontaneous combustion of the coal. *County Seeks to Avert Coal-bed Fires*, DURANGO HERALD (Oct. 25, 1998).

1980, and in an effort to reduce the nation's dependence on imported oil, Congress authorized significant tax credits for production of nonconventional fuels, including gas produced from "geopressured brine, Devonian shale, coal seams and tight formations." Act of April 2, 1980, Pub. L. No. 96-223, § 231(a), 94 Stat. 229 (codified as amended and redesignated at 26 U.S.C. § 29) ("Section 29"). In enacting Section 29, Congress gave no indication whatsoever as to its views on the ownership question presented by this case; however, the Section 29 tax credit program directly contradicts the assertions of Petitioners and supporting amici that it is impractical or onerous to distinguish between the gaseous constituents of coal and conventionally produced gas. Pet. Br. 40; *see, e.g., Brief of Amici Curiae States of Montana, New Mexico, North Dakota, Utah and Wyoming in Support of Petitioners* at 4.

Even in those instances in which a single well bore penetrates multiple gas-producing zones, commingling production does not defeat qualification for the tax credit, so long as the taxpayer employs industry-standard engineering "establish[ing] which portion of the production from the single bore is attributable to the qualified formations." Bruce N. Lemons, *IRS Rulings Further Clarify the Availability of the Nonconventional Fuel Credit*, 79 J. TAX'N 170, 172 (1993). The same evidence establishing that the source of produced gas is a coal seam for purposes of claiming tax credits also differentiates CBM for ownership purposes under the 1909 and 1910 Acts.[7] Typical evidence submitted by tax credit claimants to establish that Section 29 production comes from a coal seam includes: "the well-completion report, a radioactivity, electric, or other log defining the coal seam . . . ." Judith M. Matlock & Laurance E. Nemirow, *Section 29 Credits Under a Cloud: Tax Court Renders Rev. Rul. 93-54 Meaningless*, 88 J. TAX'N 37, 38 (1998).

[7] There is no evidence in this case of production through a single well bore of commingled CBM and conventional natural gas, and public records reveal no such multiple completions within the Tribe's Reservation.

In administering the Section 29 tax credit program, the Internal Revenue Service ("IRS") relied upon the Federal Energy Regulatory Commission, which turned to state and other jurisdictional agencies to establish the location of qualified formations. See *Marathon Oil Co. v. Federal Energy Regulatory Comm'n*, 68 F.3d 1376 (D.C. Cir. 1995). Significantly, until the Colorado Oil and Gas Conservation Commission ("COGCC") adopted Order No. 112-60 on June 17, 1988, for lands involved in this case, the COGCC treated the coal-bearing Fruitland formation and the adjacent Pictured Cliffs sandstone formation as one producing zone. Based upon testimony provided in 1988 to the COGCC by industry representatives, the COGCC found that "gas produced from the Fruitland coal seams has different chemical characteristics from gas produced from within the Fruitland sandstone or the Pictured Cliffs sandstone and should be considered a separate source of supply." COGCC Order No. 112-60, Finding 4 (June 17, 1988). In issuing its operational order for the Fruitland coal formation, the COGCC expressly warned that its orders did "not effect [sic] any claim on ownership of the gas." COGCC Order No. 112-61, Finding 3. M (Aug. 15, 1988).

Section 29 credits are "available only to a taxpayer who holds an ownership interest in the property from which the qualified fuel is produced." Dennis J. Grindinger, *The Section 29 Credit and EOR Credit: Two Major Tax Incentives Affecting The Development of Natural Resources*, 37 ROCKY MTN. MIN. L. INST. 18-1, 18-3 (1991) (citing S. REP. No. 96-393, at 88 (1979)). The IRS does not require that the facility for producing CBM be a vertical oil and gas well, but rather has permitted coal owners to claim the credit in association with vertical and

horizontal coal bed ventilation shafts. *Id.* at 18-16 (citing IRS Letter Ruling 9044073 (August 8, 1990)); *see also* Judith M. Matlock & Laurance E. Nemirow, *Section 29 Credits Under A Cloud: Tax Court Renders Rev. Rul. 93-54 Meaningless,* 88 J. TAX'N 37, 38 n.4 (1998) (citing 18 C.F.R. § 274.205(c) (since repealed)).[8]

SUMMARY OF ARGUMENT

The statutory texts of the 1909 and 1910 Acts, each read as a whole, confirm that when Congress reserved from limited, nonmineral patents "all coal in said lands, and the right to prospect for, mine, and remove the same," it reserved all coal in the ground, in its natural condition, where it unquestionably contains CBM. While that should end the matter, Petitioners have focused on definitions of the single word "coal" that refer generally to its solid nature to conclude that Congress intended to convey to nonmineral patentees the gaseous, liquid and noncombustible components of coal. Petitioners are wrong. Contemporaneous definitions and descriptions of coal confirm that in 1909 and 1910 coal was commonly understood to contain "occluded" gases, liquids and inorganic matter. The remaining portions of the statutory texts confirm the limited nature of the rights that Congress intended to grant to nonmineral patentees and that Congress did not intend to convey to nonmineral patentees any commercial extraction rights associated with coal.

The development of the Acts, as reflected in legislative reports and hearings, confirms that Congress passed the statutes for the dual purposes of conserving the coal resources of the nation for subsequent use and of permitting

[8] In order to conserve energy resources and reduce the emission of "green house" gases, Congress has urged federal agencies and coal owners to recover CBM in association with coal mining. 42 U.S.C. § 13336. The Environmental Protection Agency is also now engaged in a "Coalbed Methane Outreach Program," which encourages coal mine operators to recover CBM for commercial purposes. Website: yosemite.epa.gov/methane/home.nsf/Lookup.

agricultural settlement on the surface of western lands classified as containing valuable coal resources. In direct response to the executive withdrawal from entry of approximately 66 million acres of potential coal lands and in recognition that subsequent coal land classification would prevent nonmineral entry, Congress severed the coal estates from the remainder of the lands and authorized nonmineral patentees to receive title to the non-coal estates. The circumstances surrounding passage of the Acts and their purposes demonstrate that Congress did not intend to convey commercial CBM development rights to nonmineral patentees. Like the mineral estates reserved in subsequent legislation, the coal estates reserved in 1909 and 1910 were broad in scope. To construe the Acts as having divided the right to develop CBM from the remaining coal estate would have defeated Congress' intentions by hindering future coal development.

Should the Court conclude that the Acts are ambiguous after consideration of the statutory language, the circumstances surrounding passage, and legislative statements of the dual purposes of the Acts, then it should apply the public land law canon of construction that grants are not construed against the United States in the absence of plain language of conveyance. In reviewing the complete terms of the reservation, "all coal in said lands, and the right to prospect for, mine, and remove the same," Congress retained and did not convey the right to extract CBM from reerved "coal deposits."

ARGUMENT

I. THE ENTIRE TEXTS OF THE 1909 AND 1910 ACTS CONFIRM THAT CONGRESS RESERVED UNMINED COAL AS IT NATURALLY OCCURS, INCLUSIVE OF CBM, TOGETHER WITH EXCLUSIVE COMMERCIAL EXTRACTION RIGHTS.

The language of the 1909 and 1910 Acts severs with precision the real property interests in the designated coal

lands at issue in this case. Examination of the isolated term "coal" without consideration of all other provisions contained in the Acts does not correspond with the stated intentions of Congress. *See Department of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994) (provision in isolation often clarified by remainder of statutory scheme). As with other statutes, the entirety of the Acts must be reviewed to understand statutory intent. *Smith v. United States*, 508 U.S. 223, 229 (1993).

A. Similarities and Differences in the 1909 and 1910 Acts.

The texts of the 1909 and 1910 Acts show that they are almost identical with respect to the language of grant and reservation, and for purposes of the question before the Court, detailed review of the 1909 Act's complete text, without duplication of analysis of similar provisions in the 1910 Act, is the most efficient means to present the various matters addressed by the Tribe. In summary, however, the most significant differences between the two Acts are: a) the 1910 Act expanded on the 1909 Act by permitting limited agricultural patenting of lands that had already been classified as coal lands prior to entry (1910 Act, § 1); b) unlike the 1909 Act, which conditioned coal resource development upon compensation to the agricultural patentee for "all damages," the 1910 Act limited damage compensation to losses of crops and improvements occasioned by coal resource recovery (1910 Act, § 3); and c) agricultural entrymen choosing to challenge the classification of coal land under the 1910 Act faced a more difficult burden than did challenging entrymen under the 1909 Act (1910 Act, § 3). Under both Acts, however, Congress intended to reserve all coal in the ground and all development rights with respect to the coal deposits, including the right to extract CBM.

B. The 1909 Act—"An Act for the Protection of the Surface Rights of Entrymen".

The 1909 Act, on which Congress modeled the 1910 Act, contains three sentences, one of which contains two provisos, and each of which uses the term "coal." The first sentence of the 1909 Act states:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who has in good faith located, selected, or entered under the *nonmineral land laws* of the United States any lands which *subsequently are classified,* claimed, or reported as being *valuable for coal,* may, *if he shall so elect,* and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which *shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same.*

1909 Act, cl. 1 (R. App. 1a) (emphasis added). In keeping with the historic prohibition of agricultural entry onto known mineral lands, Congress extended the benefits of the 1909 Act only to persons who "in good faith" had considered the lands to be agricultural prior to their entry. Had such persons complied with the homestead laws and received patents before the discovery of valuable coal deposits underlying their lands, they would have received the title to subsequently discovered coal and all other minerals. *Deffeback v. Hawke*, 115 U.S. 392, 402 (1885). Such was not the case, however, because prior to the issuance of patents under the nonmineral land laws, and notwithstanding the significant personal and financial investment of the hometeaders, the lands had, in fact, been "classified, claimed or reported as being valuable for coal." Prior to 1909, the harsh consequence of the discovery of valuable coal beds prior to patent was the ouster of the agricultural entryman from the lands, unless the entryman prevailed in administrative proceedings on the question of

whether the lands contained valuable coal. *Nonmineral Application For Lands Classified As Coal,* 38 Pub. Lands Dec. at 181-82.

In the 1909 Act, Congress provided a previously unavailable option to the nonmineral entryman confronted with a subsequent report of valuable coal: "[I]f he shall so elect," the nonmineral entryman may "receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands and the right to prospect for, mine, and remove the same." By the complete terms of the reservation Congress left no doubt that the reserved interests included "all" undiscovered, unmined and unremoved coal in the ground and the right to develop that resource. Thus, Petitioners' contention that Congress intended to reserve a resource corresponding to " 'air-dried' (that is, *gas-free*) sample[s]" is unsustainable. Pet. Br. 26. *See* Porter & Ovitz, J.A. Vol. II, at 510 ("gas escapes from coal . . . continuously for a long time after the coal is mined.").

1. *The Terms Of The Reservation.*

a. "all coal in said lands". This Court has stated that it affords "nontechnical words and phrases" their "ordinary meaning." *Smith,* 508 U.S. at 228. The phrase "all coal in said lands" means unmined coal in its natural condition where it unquestionably contains CBM.

Assuming arguendo, that the meaning of the phrase "all coal in said lands" turns solely on the word "coal," that term should be construed according to common usage reflected in contemporaneous dictionaries and encyclopedias. Contrary to Petitioners' contentions, contemporary dictionaries and encyclopedias described coal as including gases and liquids. A general encyclopedia of the era specifically observed: "Gases, consisting principally of light carburetted hydrogen or marsh gas [CBM], are often present in considerable quantity in coal, in a dissolved or occluded state . . . ." VI ENCYCLOPAEDIA BRITANNICA *Coal*

575 (11th ed. 1910); *accord* III AMERICANIZED ENCYCLOPAEDIA BRITANNICA *Coal* 1643 (1890). Another common encyclopedia defined the mineral coal as "a compound especially of carbon or of decomposed woody matter, with inflammable substances and hydrogen and oxygen gases." IV THE AMERCAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE *Coal* 726 (Ripley & Dana eds., 1883). That same work differentiated between types of bituminous coal by noting that when it contains a "moderate proportion of inflammable gases it is dry coal; with more bitumen it becames fat coal. . . ." *Id.* An earlier edition of that encyclopedia had noted that in bituminous coal "hydrogen is the predominating element, in its gaseous or volatile constituents, though both oxygen and hydrogen are generally present in such coals in nearly equal parts." IV THE AMERICAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE *Coal* 726 (Ripley & Dana eds. 1873). Numerous dictionaries of the era defined "marsh gas," "methane," and "fire-damp" as gases contained within or released by coal. Pet. Br. n.13 (citing III THE CENTURY DICTIONARY 2229 (1906-09); V *id.* at 3740; UNIVERSAL ENCYCLOPAEDIC DICTAONARY 1837, 2637, 2696 (1905); IV NEW ENGLISH DICTIONARY 243 (1901); VI NEW ENGLISH DICTIONARY 188 (1908)).

Against this overwhelming evidence that coal was commonly understood to include gaseous constituents, Petitioners contend that, because coal was generally described as a "solid rock," this Court should disregard contemporaneous common knowledge of its components. *Id.* at 22-25. Use of the term "solid"—one not employed by Congress— refers to the gross, bulk properties of coal and is not a description of the physical state of coal's component parts. Given the exhaustive examination in this case of the porosity of coal and the presence of CBM and inherent moisture within that porosity, Petitioners cannot

seriously contend that coal is a solid in the sense that it is "without an internal cavity." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY *Solid* 2169 (1986). Rather, general descriptions of coal's solid nature refer to its "three dimension[][al]" character. *Id.* ("coal in place that has not been sheared, undercut, or similarly prepared for blasting."). By their focus on the term "solid," Petitioners cannot mean that coal is a crystalline substance. VII THE CENTURY DICTIONARY *Solid* 5759 (1895). In 1909, it was commonly known that, because of its "amorphous" nature and "variable composition," coal "cannot be as strictly defined as a crystalized or definite mineral can." VI ENCYCLOPAEDIA BRITANNICA *Coal* 575 (11th ed. 1910). In sum, contemporary descriptions of coal as a solid simply described its general nature and apearance, not the physical state of its components.

The common understanding of coal was consistent with the work of the U.S.G.S., particularly Chamberlin's study, reprinted by Congress in 1909, which recognized CBM as a component of coal. Chamberlin, J.A. Vol. II, at 415-72. Chamberlin performed several experiments with coal to gain a better understanding of coal's inherent gases. The experiments included the volumetric and qualitative measurement of gases released by lump coal, crushed coal and finely powdered coal. The analysis of gas obtained from coal tests showed that methane was "quantitatively by far the most important gas . . . [in] coal." *Id.*, J.A. Vol. II, at 448. In describing the results of his work, Chamberlin stated:

> The gas which escapes from coal may exist within the mass of the coal in three possible conditions. It may be mechanically held or imprisoned in minute pores, cavities, or cracks throughout the coal; it may be occluded or dissolved within the substance of coal; or it may be the result of slowly operating chemical reactions, such as those which have produced the coal from the original vegetable matter . . . . [T]here can

> be little doubt that the bulk of the gas given off from coal has arisen from the slow decomposition of organic matter . . . [and] the process which has converted vegetable humus into coal.

Id., J.A. Vol. II, at 433. Chamberlin's experiments demonstrated that CBM was not easily severable from coal, unless the coal was pulverized. *Id.*, J.A. Vol. II, at 445. Chamberlin's work confirms that the U.S.G.S., like common dictionaries and encyclopedias, did not treat coal as a substance devoid of gaseous constituents, and Petitioners have presented nothing demonstrating that Congress thought otherwise. Accordingly, even if the phrase "all coal in said lands" requires review of only the term "coal," the fact that coal contains "occluded" gaseous constituents was clear in 1909.

b. "the right to prospect for, mine, and remove". By the remaining terms of reservation, "the right to prospect for, mine, and remove the same," Congress reserved all rights needed to develop the underlying coal. The plain meaning of the verb "to mine" is:

1. To dig or burrow in or below the surface of, as of the earth . . . .
2. To make by burrowing, esp. underground; to furnish with underground passages.
3. To get, as metals, out of the earth by digging.
4. To dig into, for ore or metal.

WEBSTER'S NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE *Mine* 1374 (1916); *see also* THE UNIVERSAL ENCYCLOPAEDIC DICTIONARY *Mine* 2715 (1905) ("To dig . . . in the earth, for the purpose . . . of obtaining minerals. . . ."). By its use of the term "to mine" Congress expressly reserved in 1909 Act patents the exclusive right to dig into or extract natural constituents from the "coal in said lands." To drill or dig into "coal in said lands" for the purpose of extracting CBM from that coal is precisely the right that Petitioners claim, in direct con-

travention of the patent reservation by which their predecessors obtained limited title.

Petitioners must concede that coal mining requires the exercise of dominion and control over CBM. The right to ventilate CBM found in coal beds was so well recognized that a leading legal commentator of the era questioned whether state governments could constitutionally prohibit mine operators from releasing CBM from coal mines without running afoul of constitutional restrictions on the taking of coal estates. III LINDLEY ON MINES § 863a (3d ed. 1914). Control of CBM in the course of coal mining ranged from primitive techniques involving ignition and explosion of accumulated gases in coal mines to use of refined ventilation devices and practices. *See* 1 DEXTER S. KIMBALL, BOOK OF POPULAR SCIENCE 412 (1952) (describing role of a "fireman" in igniting mine gases); VI ENCYCLOPAEDIA BRITANNICA *Coal* 587 (11th ed. 1910) (describing huge fans and shafts used to control "fire-damp" or CBM). The right to mine coal in 1909 and 1910 clearly included the power and the duty to exercise complete and absolute control over CBM and the right to waste it. Like the term "coal," the term "mine" should be contrued consistently with Congress' understanding as of the time of enactment, and the meaning of that term should not be restricted by recently realized values of CBM or recent technological advances in the *in situ* extraction of CBM from coal. *See Burke v. Southern Pac. R.R.*, 234 U.S. 669, 688 (1914) (" 'no better point to determine [title] than at time of issuing the patent.' " (quoting *Cowell v. Lammers*, 21 F. 200, 206 (D.Cal. 1884)).[9]

[9] The fact that the United States conferred ownership of the reserved coal estates upon the Tribe by a means other than patent should have no bearing on the Tribe's legal interests. *See Burke*, 234 U.S. at 703-04 (citing *Barden v. Northern Pac. R.R.*, 154 U.S. 288, 341 (1894)). In cases in which a tribe has established a prima facie case of ownership, Congress has placed the burden of proof upon those contesting the tribe's ownership interest. 25 U.S.C. § 194; *see Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

The electing nonmineral entryman also agreed to forgo any right "to remove" the "coal in the lands." The CBM production processes employed by Petitioners require the removal of hundreds of tons of the Tribe's "solid" coal through each wellbore. Creel Aff. § 14, J.A. Vol I, at 334. While Petitioners may view the removal of the Tribe's coal merely as an incidental activity, such removal constitutes a direct violation of the conditions under which the patentee was permitted to remain on the premises. The additional terms of reservation, "the right of prospect for, mine, and remove the same," which Petitioners chose not to evaluate, confirm the broad scope of the coal estate that Congress reserved.

2. *The Remaining Provisions of the Statute—Relative Rights to Coal Deposits.*

In the second sentence of the 1909 Act, Congress set the parameters for future conduct between the nonmineral patentee and a subsequent coal owner with respect to the reserved coal estate and confirmed the availability of administrative appeals challenging coal classification for a nonmineral entryman choosing not to receive a limited, non-coal patent. Like the other provisions of the 1909 Act, the second sentence is critical to understanding Congress' intent.

> The *coal deposits in such lands shall be subject to disposal by the United States* in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: *Provided, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the*

> *disposal by the United States of the coal deposit: Provided further,* That nothing herein contained shall be held to affect or abridge the right of any locater, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him.

1909 Act, cl. 2 (R. App. 1a-2a) (emphasis added).

In providing that "[t]he *coal deposits* in such lands shall be subject to disposal by the United States . . .," Congress clearly contemplated subsequent disposition of reserved coal on an in place basis. The common meaning of the term "deposit" at the time of passage of the 1909 and 1910 Acts included sedimentary layers, such as coal beds:

> In *geol.* any mass of material which has been thrown down from, or moved and gathered together by, water . . . if the material be evenly and uniformly distributed, it would more generally be termed a *bed* or *layer*.

III THE CENTURY DICTIONARY 1545 (1914). The term of contemplated future disposition by the United States, "coal deposits," is synonymous with the term of reservation, "all coal in said lands." While Congress unquestionably retained the right to dispose of the reserved "coal deposits" in accordance with coal-land laws that might be subsequently enacted, the coal-land law then in place was the Coal Lands Sales Act of 1873, which provided for disposition of coal on an acreage, in place basis. As contemporaneously interpreted by the Department of the Interior, Congress contemplated continued disposition of reserved coal estates under the provisions of the Coal Lands Sales Act of 1873. *Agricultural Entries of Coal Lands—Act of June 22, 1910,* 39 Pub. Lands Dec. 179, 185 (1910). The coal estate patent to the coal entryman conveyed "all coal and the coal deposits in the land above described, together with the right to prospect for, mine

and remove the coal . . . ." *Id.*[10] The term "coal deposits" considered in light of U.S.G.S. classification practices conforms to the common definition: "these bedded deposits, generally of wide extent . . . differ from most other mineral deposits. . . ." *Coal Lands—Character of Land—Evidence,* 34 Pub. Lands Dec. at 201.

In clarifying the rights of surface patentees and those of subsequent coal estate owners, Congress provided:

> [N]o person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner [nonmineral patentee] under such patent, except upon such conditions as to security for and *payment of all damages* to such owner caused thereby as may be determined by a court of competent jurisdiction . . . .

1909 Act, cl. 2 (R. App. 1a) (emphasis added). Thus, Congress assured the nonmineral patentee that before coal prospecting, mining or removal could commence on his land, either his consent would be obtained or he would receive security for "*all* damages" caused thereby. Applying Petitioners' construction of the term "coal" to this provision would require a coal developer to compensate the nonmineral patentee for the value of gas lost or wasted in the course of mining. This result, when measured against the whole statute and the purposes revealed by its terms, is absurd and contravenes the effect of Congress' comprehensive reservation of "all coal in said lands, and

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[10] In *Watt v. Western Nuclear, Inc.,* 462 U.S. 36, 54 n.14 (1983), this Court referred to the Department of the Interior's guidance set forth in *Alabama Coal—Lands—Act of April 23, 1912,* 41 Pub. Lands Dec. 32, 33 (1912), which indicated that there was at that time "no law which provides for the disposition of the coal in these lands." Care must be taken to distinguish between the specific situation in Alabama, where Congress had already precluded patenting, even of coal land, by any means other than the agricultural land laws and the situation in other portions of the country where the Coal Lands Sales Act of 1873 continued to be operative. Act of March 3, 1883, ch. 118, 22 Stat. 487 (1883).

the right to prospect for, mine, and remove the same." While intending to protect agricultural entrymen from all damages to the surface estate resulting from future coal mining, Congress certainly did not intend that the nonmineral owner, who had given up all claim to underground coal, would also receive compensation for CBM vented or flared in the course of coal mining.[11] *See* 1910 Act, § 3 (R. App. 4a-5a).[12]

Congress, having authorized future coal estate owners to utilize the surface estate, then addressed the rights of nonmineral patentees with respect to the underlying coal. The first proviso of the second sentence states:

> *Provided,* That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit . . . .

Provisos, "generally . . . except something from the enacting clause, . . . or restrain its generality. . . ." *Minis v. United States*, 40 U.S. (15 Pet.) 423, 445 (1841). As exceptions to the general operation of the statute, pro-

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[11] Amici acknowledge the incongruity of the 1909 Act's compensation provisions and Petitioners' statutory interpretation, and in doing so implicitly recognize that the express statutory terms, rather than the common law "accommodation doctrine," establish the relative rights of surface patentees and coal estate owners under the Acts. *Brief of Amici Curiae the Coal Bed Methane Ad Hoc Committee, the Wyoming Independent Producers' Association and the Independent Petroleum Association of America In Support of Petitioners* at 26. Amici even suggest it may no longer be lawful for a coal owner to vent valuable CBM as a necessary incident of coal mining, but inexplicably dispense with these complications by stating they are "unnecessary to address at this time . . . ." *Id.*

[12] Unlike the 1909 Act, the 1910 Act limits damage compensation for coal prospecting to "the crops and improvements on such lands . . . ." *See, e.g., Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488 (1928) (construing similar provision under 1914 Act and denying surface damage claims). Because CBM did not pass to agricultural patentees under either Act, the distinction makes no difference in this case.

visos are strictly construed. *See, e.g., Bridges v. United States,* 346 U.S. 209, 216 n.14 (1953) (citing *United States v. McElvain,* 272 U.S. 633, 639 (1926)). This proviso grants limited permission for the nonmineral patentee to "mine coal," subject to clear restrictions on the location of and purpose for use and only until "disposal by the United States of the coal deposit." By direct implication, the first proviso of the 1909 Act prohibits any mining of coal by the nonmineral patentee following disposal of the coal deposits by the United States, which disposal occurred in this case in 1938. Further, during the period of permissive mining and use of coal by the nonmineral patentee, commercial exploitation of coal was impermissible. 1909 Act, cl. 2 (R. App. 1a) (permitting mining for "domestic purposes prior to disposal"). Congress plainly attempted in this proviso to prevent any dispute between a subsequent coal patentee and the nonmineral patentee with respect to the underlying coal by making it absolutely clear that the nonmineral patentee's permissive invasion of the coal beds terminated upon disposal of the coal deposits.

Petitioners misconstrue the first proviso by suggesting that it was merely confirmation of the nonmineral entryman's right to mine coal as an adjunct of agricultural title. Pet. Br. 25. They fail to recognize that the permissive right to mine coal for domestice purposes was an exception to the long-standing practice prohibiting agricultural entrymen from exploiting known mineral resources. The Department of the Interior, in construing the proviso's statutory counterpart in the 1910 Act, clearly viewed this permissive access to coal as an exception. *Alabama Coal Lands—Act of April 23, 1912,* 41 Pub. Lands Dec. 32, 33 (1912) ("Persons having homestead entries . . . obtain no right to mine coal therefrom, except for their own domestic use, as appears from the first proviso to section 3 of the act of June 22, 1910."). To be sure, because the

gaseous components of coal "escape[] from coal . . . continuously for a long time after the coal is mined," nonmineral patentees necessarily mined and removed lumps of coal containing CBM and burned all the combustible parts of coal, including CBM, in their stoves and furnaces. Porter & Ovitz, J.A. Vol. II, at 510. But because it was "dealing with a practical subject in a practical way . . .," *Burke*, 234 U.S. at 679, Congress terminated the nonmineral patentee's utilization of the coal beds upon subsequent disposal of the coal deposits. Instead of construing this proviso strictly, as required by *Bridges*, 346 U.S. at 216 n.14, Petitioners seek to create an additional exception to the Acts because technologies now exist that permit *in situ* extraction of CBM from coal. Congress, however, made no such additional exception until passage of the Enzi Act, which excludes from its operation the lands involved in this case. Pub. L. No. 105-367, 112 Stat. 3313 (1998).

The second proviso of the second sentence is fundamentally different in character from the first proviso and confirms the pre-existing right of a nonmineral patent applicant to contest the classification of coal land, and the final sentence of the 1909 Act establishes the burden of proof in such contests. In order to oust the nonmineral patent applicant, who had entered the land prior to coal land classification, the 1909 Act required the challenging party, most often the government, to show that the land was "chiefly valuable for coal."[13] The predecessors in title to the Petitioners in this case, however, elected to secure limited patents that reserved to the United States "all the coal in the land, and the right to prospect for, mine, and remove the same." Notice of Election, J.A. Vol. I, at 290.

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[13] The 1910 Act, which permitted limited agricultural entry and patenting following coal land designation did not retain this same burden, but rather required that the challenging nonmineral patent applicant "disprov[e][] such classification." 1910 Act, § 3 (R. App. 5a).

C. The Absence of Ambiguity in the 1909 and 1910 Acts.

In the Acts, Congress reserved "all coal in the lands" or "coal deposits." Petitioners' assertions notwithstanding, Congress did not indicate that the term "coal" was intended to mean a substance devoid of gases, liquids and non-combustible components. Both common definitions and technical works of the era specifically referenced coal's gaseous constituents. In equating the terms of reservation, "all coal in the lands," with the terms of future disposition, "coal deposits," Congress' intentions are best interpreted as references to the sedimentary strata or beds of coal underlying the lands. The simultaneous reservation of prospecting, mining and removal rights included the traditional and necessary control of CBM liberated by disturbed coal. The Acts read as a whole reveal no ambiguity on these points and resolve the question before the Court in favor of the Tribe.

II. THE PURPOSES OF THE LEGISLATION, THE SURROUNDING CIRCUMSTANCES, OTHER PUBLIC LAND LAWS, AND PRACTICALITY ALL CONFIRM THAT CONGRESS DID NOT INTEND TO CONVEY COMMERCIAL CBM RIGHTS TO NONMINERAL PATENTEES.

The texts of the 1909 and 1910 Acts authoritatively demonstrate that Congress did not intend to convey commercial CBM extraction rights to Petitioners' predecessors in title. *See Hubbard v. United States*, 514 U.S. 695, 702 (1995) (congressional language determinative). Legislative history, on which Petitioners place great reliance, does not contradict the statutory language, but rather confirms the broad scope of the coal estate reservations and the limited purpose of the nonmineral patents issued under the Acts. Pet. Br. 28-31. The circumstances surrounding enactment further indicate that Congress sought to protect the surface rights of nonmineral entrymen, but had no interest in dividing the commercial values obtainable from the nation's coal resources. *Robinson v.*

Shell Oil Co., 519 U.S. 337, 340-41 (1997) (considering historical context). Neither the interrelationship of the Acts with subsequent enactments nor the so called "practicality" of Petitioners' construction justifies abandonment of Congress' intentions expressed in the Acts.

A. Legislative Hearings and Debates.

Despite numerous issues regarding the coal industry discussed by Congress in the course of developing the Acts, the statutes addresed only two issues: the access of agricultural entrymen to designated coal lands and the continued protection of the nation's coal resources from improvident disposition. *See, e.g., Hearings on Coal Lands and Coal-Land Laws of the United States Before the House Committee on Public Lands*, 59th Cong., 1-18 (Dec. 17, 1906) (testimony of Edgar E. Clark) ("Clark Testimony"). Congressional discussions regarding the legislation support the Tribe's position in this case.[14]

Legislative history unequivocally shows that Congress did not define coal as Petitioners now would, that is, a substance devoid of liquids, gases and noncombustible components. *See, e.g.*, Campbell Testimony at 19 (discussing moisture content of North Dakota lignites); *Hearings on Coal Lands and Coal-Land Laws of the United States Before the House Committee on Public Lands*, 59th Cong., 3 (Jan. 11, 1907) (testimony of A. H. Brooks) (discussing ash content and partings in Alaska coals). Moreover, the U.S.G.S. had persuaded Congress that coal's value included its potential for use under advancing and yet-developed technologies. *Id.* ("It may be that gas will

14 "The legislation is unquestionably necessary and desirable, whether we view it from the standpoint of the reservation to the Government of the coal deposits in public lands until such time as there may be a demand for the deposits, or from the standpoint of the importance of providing for orderly development, settlement, reclamation and cultivation of the agricultural surfaces of the public domain." *Agricultural Entries on Coal Lands*, S. REP. No. 61-703, at 3 (1910).

finally be adopted generally—either gas from oil or gas from coal."). Congress relied upon the U.S.G.S. to decide what lands contained sufficiently-valuable coal resources to justify their designation as coal lands. *Agricultural Entries on Coal Lands*, H.R. REP. No. 61-377, at 3-4 (1910) ("[T]he exercise of judgment as to what constitutes . . . coal lands must rest with the administrative department of the Government."). In this respect, Congress resisted efforts to override U.S.G.S. coal land determinations. *Protection of Surface Rights of Entrymen*, H.R. REP. No. 60-2019, at 8 (1909) (views of Mr. Gronna, proposing exclusion of North Dakota lignite lands from classification); *Protection of Surface Rights of Entrymen*, S.R. REP. No. 60-1091, at 1 (1909) (proposing amendment excluding lignite from consideration). Congress adopted the U.S.G.S. classification methodology which rested not only upon the identification of coal beds, but also upon the potential value of the coal deposits. As reported by the House Public Lands Committee:

> [The legislation] proposes a separation which retains in the hands of the Government a mineral deposit the presence of which is known, or may be ascertained with reasonable certainty, by the proximity of coal croppings or the presence of known geological horizons carrying coal.
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> * * * *
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> It must be borne in mind that the coal underlying some classified lands, and those which may be classified in the future, is of a quality . . . that has no merchantable value at this time . . . . The Interior Department in making its classification has looked not only to the present but to the prospective coal value, and, therefore, all lands which are known to contain coal of workable thickness, or in the proximity of workable croppings, or in known coal areas where geological conditions render probable the existence

> of workable veins at reachable depths, are classified as coal lands.

H.R. REP. NO. [illegible]377 at 3-4.

In disregard of the broad scope of the coal reservations reflected by the language of the Act and the congressional reports accompanying their passage, Petitioners rely principally upon two bits of isolated colloquy in an effort to redefine coal. Pet. Br. 29-30. First, Petitioners maintain that Rep. Mondell's observation that Congress had chosen not to enlarge the coal reservation to include all minerals in the 1909 Acts should compel this Court to conclude that the non-solid constituents of coal were plainly conveyed to nonmineral entrymen. *Id.* (citing 43 CONG. REC. 2504 (1909)). Representative Mondell's statements, while reflecting a cautious approach to the use of mineral reservations, has no bearing on the expansive reservation of "all" coal deposits at issue in this case. Nor does Representative Mondell's subsequently expressed disapproval of proposals to also reserve petroleum mean that Congress intended to separate the components of reserved coal on a molecular level. Pet. Br. 30 (citing 45 CONG. REC. 6044 (1910)). To the contrary, those discussions confirm that Representative Mondell considered the reservation of coal deposits to include the identifiable coal beds for which the lands had been classified. 45 CONG. REC. 6044 (1910) ("geological horizons, running unbroken through large areas of territory").

In looking to legislative history as their guide to statutory interpretation, Petitioners assign no importance to statements describing the purpose of the limited patents granted under the Acts. The congressional reports and debates accompanying passage of the Acts, however, clearly indicate that Congress intended to open the surface of designated coal lands for agricultural development, and Congress never indicated that surface entrymen would be permitted to invade reserved coal beds for purposes of

commercial mineral extraction. *See* H.R. REP. No. 60-2019 at 4 ("[I]f we have no legislation, [nonmineral entrymen] would ultimately lose their lands and improvements, and it is imperative that legislation for their relief be had."); H.R. REP. No. 61-377 at 1 ("This bill provides for the opening to agricultural settlement and development the surface of lands which have been classified as coal lands . . . ."); *Agricultural Entries on Coal Lands*, S. REP. No. 61-703, at 2 (1910) ("The committee's effort has been to present a bill which would not only meet the conditions which exist, but one so carefully drawn as to make possible the settlement and development of the surface of such coal lands as are fit for agricultural purposes, while at the same time providing every possible safeguard against the acquirement of the surface of these lands for speculative purposes."). As Congressman Mondell stated, the entryman "relinquishes all rights and claim to the coal." 45 CONG. REC. 6152 (1910). The Acts were not intended to permit the entryman "to acquire any right whatever in the coal under the surface of the ground he settles upon . . . ." 45 CONG. REC. 6154 (1910) (statement of Rep. Butler). The legislative history contradicts rather than supports Petitioners' view that Congress granted nonmineral patentees the right to enter reserved coal deposits, long after their conveyance to third parties, in order to extract CBM for commercial purposes.

B. Circumstances Surrounding Passage of the Acts.

The 1909 and 1910 Acts were part of a larger national debate involving the conservation of the nation's natural resources for the future benefit of the public. *Leo Sheep v. United States*, 440 U.S. 668 (1979). While addressing coal land matters, the Roosevelt administration had also increased the size of the country's forest reserves by almost five times. *See* Gates at 580. Indeed, President Roosevelt and his successor in office, President Taft, also withdrew and reserved several million acres of petroleum lands. *Id.*

at 732-38; *see United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

The emergence of the conservation movement mirrors the specific history of coal resource protection addressed in the 1909 and 1910 Acts. The liberalization of evidence needed to support coal land classification reflected in the Secretary of Interior's 1905 decision, the withdrawal of western lands from entry in furtherance of coal land classification in 1906, and the dramatic increase of coal land acreage prices commencing in 1907 were each part of a comprehensive effort to protect the nation's coal resources and to dispose of them for the benefit of the public as a whole. *See Coal Land-Character of Land-Evidence*, 34 Pub. Lands Dec. at 194; Letter from Acting Secretary to Commissioner of the General Land Office (July 26, 1906), C.A. App. Vol. 6, at 1251 (C.A. Doc. Entry 3/28/95 [843705]); *Coal-Land Laws and Regulations Thereunder*, 35 Pub. Lands Dec. at 665.

Additionally, the geological and technical work of the U.S.G.S. with regard to coal resources revealed both an appreciation of coal's importance and a thorough knowledge of coal. As reported by the U.S.G.S. geologist Marius R. Campbell:

> [T]he Geological Survey has been giving more and more attention to the subject of coal, both as regards its geological relations and its technology. The need for information in both branches is imperative, for, although the amount of coal in the various fields seems so great as to be well nigh inexhaustible, the consumption of coal is increasing so rapidly that already the question of the future supply of fuel is a serious one and the Government is surely justified in using every means possible to conserve the supply for the use of future generations.

Campbell, J.A. Vol. II, at 404. In improving the efficient use of even low-grade coal, the U.S.G.S. developed

the "gas producer," a device that extracted through distillation—not combustion—the volatile gases of coal.

> The gas producer is an agency of conservation . . . . In States in which deposits of low-grade coal, lignite, and peat are found, the present cost of power, as developed by steam plants with coal that has been shipped a considerable distance, can be materially reduced by placing producer plants at the mines or bogs, so as to utilize these low-grade fuels without cost of shipment by generating electric current which can be easily transmitted to desired points within a wide radius.

Fernald, J.A. Vol. II, at 526. While the extraction of gases from coal for fuel purposes had not advanced sufficiently to capture the commercial value of CBM, the U.S.G.S. had completed detailed studies of the presence of "occluded" gases in coal. Chamberlin, J.A. Vol. II, at 415, 434. In a U.S.G.S. study completed shortly after Chamberlin's reported experiments, the U.S.G.S. confirmed the constituent nature of CBM in coal:

> In some cases the volume of gas liberated from broken coal is greater than the volume of *the coal itself—that is, of the actual solid and the cellular space combined* . . . . [M]ethane [is] either dissolved molecularly or adsorbed upon the inner surfaces of the cellular spaces.

Porter & Ovitz, J.A. Vol. II, at 511 (emphasis added). These circumstances confirm that Congress reserved CBM when it reserved the "coal deposits" in coal lands.

C. Historic Progression, Subsequent Legislation, and Disposition.

1. *Historic Progression.*

The language and purposes of the Acts and the conservation ethic of the era support the Tribe's position that Congress included CBM and the right to control CBM within the coal estate reservations of the 1909 and 1910

Acts. Prior to passage of the Acts, on classified coal lands, the coal land entryman received the entire fee simple estate and the nonmineral entryman obtained nothing. In departing from prior law and opening designated coal lands to agricultural settlement, Congress retained all underlying coal and all rights needed to prospect for, mine or remove coal, including the right to vent CBM. In interpreting the scope of the coal estate, this Court should construe the Acts and the Coal Lands Sales Act of 1873 in pari materia. Because Congress neither expressly nor by necessary implication chose to diminish the coal estate except for the temporary privilege to mine coal for domestic purposes, this Court should not recognize new reductions to the coal estate proposed almost a century later by Petitioners. *See Western Nuclear*, 462 U.S. at 36; *Leo Sheep*, 440 U.S. at 683.

Petitioners observe that the 1909 Act was the first in a series of public land statutes that progressively increased the types of specific mineral estates reserved from agricultural entrymen, until, upon passage of the SRHA, Congress took the final step and reserved all minerals from agricultural lands. Pet. Br. 31-36. They suggest that the "historical progression of public land statutes" requires this Court to construe the coal estate reservations narrowly since these Acts were the first steps encroaching onto the traditional domain of homesteaders. Petitioners' view of public land law disregards the significance of mineral classification, which set a starting point barring agricultural entry. At each major stage of conversion from a classification system to a full mineral reservation system, if land was known to contain a valuable mineral, Congress withheld that mineral estate from the agricultural settler. In permitting limited agricultural entry, mineral resources unknown or undiscovered passed to agricultural settlers as they always had. But the suggestion that a reserved estate of "all" coal, or "all" gas, or "all" oil should somehow be viewed narrowly in scope simply does not

follow from the fact that Congress later reserved all minerals from agricultural patents.

2. *Subsequent Legislation.*

Petitioners maintain that comparing the 1909 and 1910 Acts with mineral reservations in subsequent legislation involving other public lands reveals a congressional intent to exclude CBM from within the scope of coal estates reserved in the Acts. The Tribe disagrees.

a. The 1912 Act. In passing the 1912 Act, Congress permitted agricultural entrymen to obtain limited agricultural patents for certain lands in Utah identified as valuable for petroleum. Act of Aug. 24, 1912, ch. 367, 37 Stat. 496 ("1912 Act"). Congress provided that the limited patents under the 1912 Act would contain a reservation of "all the oil and gas in the lands so patented, together with the right to prospect for, mine, and remove the same . . . ." *Id.*, § 3. Unlike the coal estates reserved in the 1909 and 1910 Acts, the reserved petroleum estates under the 1912 Act were suspended from disposition pending subsequent legislation. *Id.* Because the Utah lands had not been classified as containing valuable coal resources, Congress declined to include a reservation of coal estates in the limited 1912 Act patents, thus permitting coal deposits, if any later be discovered, to pass to the agricultural entrymen. Congress gave no indication that the 1912 Act was somehow intended to limit the scope of coal estates reserved on the designated coal lands.[15]

b. The 1914 Act. In passing the 1914 Act, Congress followed the same pattern established in 1909, 1910 and

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[15] On the same day that Congress passed the 1912 Act, it also amended the Pickett Act of 1910 and confirmed that a withdrawal of land from mineral entry while the U.S.G.S. reclasssified land for one fuel mineral, such as oil, also withdrew such land from entry for another fuel mineral, such as coal. Act of August 24, 1912, ch. 369, 37 Stat. 497 (amending Act of June 25, 1910, ch. 421, 36 Stat. 847). This legislation eliminated any question of the need for double withdrawals by Interior.

1912 and opened for limited agricultural patenting lands that had been classified as valuable for specific enumerated minerals other than coal and precious metals. Act of July 17, 1914, ch. 142, 38 Stat. 509 ("1914 Act"). In the limited patents issued under the 1914 Act, Congress required a reservation of "all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same." *Id.*, § 3. Again, the 1914 Act has no limiting effect upon the 1909 or 1910 Acts, yet Petitioners seize upon the enumeration of the specific mineral "gas" in the 1914 Act as a constraint on the scope of the coal estates reserved under the 1909 and 1910 Acts. There is nothing in the language or history of the 1914 Act suggesting that Congress' purpose in using the term "gas" in the 1914 Act was to limit the coal rights reserved under the 1909 and 1910 Acts. *See, e.g., United States v. Louisiana*, 394 U.S. 11, 19 (1969) (declining to link unrelated statutes). Because CBM was a commonly recognized constituent of coal in 1909 and 1910, the fact that it assumes a physically gaseous state upon extraction or that it might also fall within the broad definition of "all gas" on other lands, simply has no relevance to construction of the coal estate reservations at issue in this case.

The federal government's mineral patenting practices further confirm the absence of conflict between the Acts and subsequent "gas" reservations on other lands. One could not obtain a gas placer patent on designated coal land, unless the applicant disproved the existence of underlying coal. Thus, one seeking title under the General Mining Law of 1872 based upon the discovery of CBM would have had to disprove the existence of the very coal deposits from which CBM was being extracted in order to obtain any title. *See, e.g., Ohio Oil Co.*, 60 Interior Dec. at 342; *Ohio Oil Co.*, 58 Interior Dec. at 753; *H. W. Rowley*, 58 Interior Dec. at 550. The administration of

designated coal lands demonstrates that the conflict Petitioners seek to create between the Acts and subsequent statutes does not exist.

3. ***Disposition.***

The subsequent disposition of reserved coal estates, both before and after passage of the Mineral Leasing Act of 1920, is consistent with the broad reservation of all coal resources and related development rights reserved by Congress in the Acts, including the right to extract CBM for commercial purposes. Act of February 25, 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181-236) ("Mineral Leasing Act").

Although not mentioned by Petitioners, following passage of the Acts, the Department of the Interior authorized continued sale of coal estates, with payment to be made "at the price fixed for the whole acreage." *Agricultural Entries of Coal Lands—Act of June 22, 1910*, 39 Pub. Lands. Dec. at 185. The coal estate patent to the coal entrymen conveyed "*all coal and the coal deposits* in the land above described, together with the right to prospect for, mine and remove the coal . . . ." *Id.* (emphasis added). Interior's form of conveyance and its implementation of the language of the Acts leaves no doubt that the statutory terms of reservation as interpreted at the time included all coal as it lay in the ground. The coal estate patentee—not the surface patentee—received the right to exercise dominion and control over CBM. Contrary to Petitioners' contentions in this case, Congress did not intend the coal estate patentee's ownership interests in underground coal or the coal estate patentee's coal development rights to be any less than those enjoyed under coal lands patents issued under the Coal Lands Sales Act of 1873.

Unlike the coal estates reserved under the 1909 and 1910 Acts, which were subject to continuing patenting until 1920, other specific mineral estates subsequently re-

served in 1912 and 1914 were "subject to disposal by the United States only as shall be hereafter expressly directed by law." 1912 Act, § 3; 1914 Act, § 3. Congress authorized the disposition of these specific mineral estates only through federal leasing upon passage of the Mineral Leasing Act. Simultaneously, it revoked subsequent land patenting for most federal minerals and required that those mineral estates, including the coal estates reserved under the Acts, generally be disposed of through leasing. Particularly because the Mineral Leasing Act served as the exclusive vehicle for disposition of specific mineral estates reserved under the 1914 Act, courts have used it in construing the scope of those estates under the theory that Congress' intent to lease substances, such as non-hydrocarbon gas, reflects its intent to have reserved those substances. *See, e.g., Aulston v. United States*, 915 F.2d 584 (10th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991). The intervening period of disposition of coal estates between 1909 and 1920 established that Congress intended to reserve and convey an entire coal estate, including CBM, and all associated development rights. In any event, CBM development rights fall reasonably within the scope of "coal deposit" rights leased under the Mineral Leasing Act, and that act's provisions do not demonstrate that Congress viewed CBM as a non-constituent of coal. Mineral Leasing Act, § 2 ("coal deposits"), § 7 ("the privilege of mining or extracting the coal in the lands . . . ."); 30 C.F.R. § 206.264 (establishing royalty valuation for in situ coal development); *In Situ Gasification of Coal*, No. M-36890, Opinion of Regional Solicitor (May 10, 1977), Gower Federal Service (Min.) SO-1 (1979) (recognizing federal lessee of coal deposits as having exclusive possession of coal beds).

On two subsequent occasions, Congress has limited the federal interest in reserved coal estates when conflict has arisen between the government and agricultural patentees. Act of August 11, 1955, ch. 795, 69 Stat. 679 (codified

as 30 U.S.C. §§ 541-541i) ("1955 Act"); Enzi Act. In both instances, Congress has permitted agricultural patentees to enter into reserved coal beds to extract components of coal; however, in neither instance has Congress permitted such entry to interfere with rights of third parties in reserved coal estates previously secured from the government. 30 U.S.C. § 541c; Enzi Act § 1(b)(3)-(6). In permitting mining of source material from lignites under the 1955 Act, Congress recognized that the coal estate reservations under the 1909 and 1910 Acts barred such development without legislation. 30 U.S.C. § 541c. Similarly, under the Enzi Act, Congress permitted agricultural patentees to continue CBM extraction; however, Congress limited its waiver to only those instances in which CBM wells had already been drilled or authorized by agricultural patentees under pre-existing CBM leases. Enzi Act § 1(a)(1)-(2). Those subsequent legislative actions represent limited exceptions intended to avoid conflict between the federal government and patentees, but do not support a narrow construction of the scope of coal estates under the 1909 and 1910 Acts.

D. Practicalities.

Reading the 1909 and 1910 Acts "in a practical way" and taking account of the "condition of the country" when the Acts were passed compel the conclusion that CBM is part of the reserved coal deposits that belong to the Tribe. As Petitioners note, public land statutes should be interpreted in view of "'the condition of the country when the acts were passed . . . .'" *Leo Sheep*, 440 U.S. at 682 (quoting *Winona & Saint Peter R.R. v. Barney*, 113 U.S. 618, 625 (1885)); Pet. Br. 27. In addition, as Petitioners repeatedly admonish, the subject of mineral ownership should be dealt with in a practical way. *Burke*, 234 U.S. at 679; Pet. Br. 22. The proper application of those standards to this controversy results in the inescapable conclusion that CBM is part of the reserved coal estate.

At the time the Acts authorized division of the coal deposits from the remainder of the land, the overwhelming practical consideration affecting the treatment of CBM concerned the essential need to ventilate CBM in the course of coal mining.[16] *See, e.g.*, M. Duel & A. Kim, *Methane Control Research: Summary of Results, 1964-80*, U.S. Bureau of Mines, Bulletin 687, at 3 (1984). While the owner of the coal estate could not commercially develop the reserved coal without disposing of the CBM, the nonmineral patentee had no interest in CBM found in the coal. In short, the necessity for the coal owner to deal with the CBM in mining the reserved coal is the dominant practical consideration in construing the Acts in light of the condition of the country at the time of their enactment.

Petitioners strain to sever ownership of CBM from the solid parts of unmined coal and to create a substitute and artificial link between CBM and the natural gas found outside the coal beds. That approach is premised on false legalities rather than practicalities, and ignores the overriding need at the time the Acts were passed for the coal owner to control the CBM in the course of mining the reserved coal deposits. Moreover, Petitioners' concerns relate to the situation today and do not bear on Congress' intent when it passed the Acts. As is clear from the circumstances surrounding the Section 29 tax credits, the problems Petitioners seek to portray with regard to a "split" gas estate are easily resolved under today's technology. There simply is no practical problem in distinguishing coalbed methane from other gases. Petitioners

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16 Federal law requires that coal mine operators ventilate mines to "carry away methane . . . ." 30 U.S.C. § 863(b), and to formulate and implement "methane . . . control plans . . . ." 30 U.S.C. § 863(o); 30 C.F.R. § 75.370. Coal mine operators are also required to drill "boreholes" into coal in advance of the working mine face. 30 C.F.R. § 75.388.

themselves have done so in order to collect tax credits and could do so for other purposes as well.

Petitioners also argue that their approach is rendered practical by the "accommodation doctrine" of state mineral law. But the accommodation doctrine does not establish title; it permits the owner of one estate to use another's property only when the absence of such use would deprive the owner of his estate. Here, there is no dispute that the Petitioners may drill through the Tribe's coal to obtain gas to which they are entitled from different formations. As the Tenth Circuit found, however, Petitioners may not stretch the accommodation doctrine into a rule that permits them to enter into the Tribe's coal deposits to extract CBM that they neither own nor have any right to develop. *Southern Ute Indian Tribe v. Amoco Prod. Co.*, 151 F.3d 1251, 1261-63 (10th Cir. 1998) (citing *United States Steel Corp. v. Hoge*, 468 A.2d 1380 (Pa. 1983); *Vines v. McKenzie Methane Corp.*, 619 So.2d 1305 (Ala. 1993) (other citations omitted)) (Cert. Pet. App. 21a-24a).

III. THE CANON OF CONSTRUCTION THAT AMBIGUITIES IN LAND GRANTS BE RESOLVED IN FAVOR OF THE SOVEREIGN SUPPORTS THE CONCLUSION THAT CBM WAS INCLUDED IN THE RESERVED COAL ESTATES.

A. Ambiguous Language in Federal Land Grant Statutes Is Interpreted in Favor of the Federal Objectives Underlying the Legislation.

In construing the public land laws, the long-standing rule is that statutes granting rights from the federal government "must be construed favorably to the government and that nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the government." *Caldwell v. United States*, 250 U.S. 14, 20 (1919) (citations omitted). Stated another way, "if rights claimed under the government be set up

against it, they must be so clearly defined that there can be no question of the purpose of congress to confer them." *Sioux City & St. P. R. Co. v. United States*, 159 U.S. 349, 360 (1895) (citations omitted). Moreover, silence in the language of such grants should not be read so as to depart from prevailing policies or practices, even if the general terms of the legislation could be so construed. *United States v. Sweet*, 245 U.S. 563, 572 (1918); *see generally Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978) (support for refusing to treat water as "valuable mineral" under federal mining laws); *Caldwell*, 250 U.S. at 20 (support for holding that railroad companies having right to take timber for railroad construction do not have right to sell tops of trees cut for railroad ties); *Northern Pac. Ry. v. Soderberg*, 188 U.S. 526, 534 (1903) (lands valuable as granite quarry were mineral lands excepted from railroad grant).

To be sure, the canon must be applied with care. It should not be invoked to construe in a miserly manner legislative grants designed to induce the construction of facilities such as railroads or the completion of other tasks intended to benefit the nation. The grants found in such legislation "stand[] upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted." *United States v. Denver & Rio Grande Ry.*, 150 U.S. 1, 14 (1893) (citation omitted), *quoted in Leo Sheep*, 440 U.S. at 682. Likewise, the rule does not apply in situations in which a restrictive reading of federal legislation would deny bona fide settlers all title to the public land on which they settled. *Great Northern Ry. v. Reed*, 270 U.S. 539, 546 (1926); *Ard v. Brandon*, 156 U.S. 537, 543 (1895).

B. Application of the Canon Here Compels the Conclusion That the Owner of the Coal Deposits Owns the CBM.

To the extent that the Acts are deemed ambiguous, the canon of construction that "nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it" squarely applies. *United States v. Union Pac. R.R.*, 353 U.S. 112, 115 (1957) (citations omitted). Application of the canon to the Acts requires that the CBM remain legally in the same place as it is found physically—as part of the Tribe's coal deposits reserved for future disposition by the United States. Ambiguity in the Acts, if any, results from legislative imprecision in describing the boundary between the limited, nonmineral patentee's estate and the coal deposits reserved for disposition under the coal lands laws. To avoid an absurd result, the canon requires examination of the federal purposes underlying the Acts, as well as the context in which Congress passed the Acts. The 1909 and 1910 Acts had two purposes: to permit agricultural entry onto valuable coal lands otherwise unavailable for such entry; and to protect the federal interests in reserved coal deposits later to be conveyed to coal estate grantees. Both objectives must be examined to determine which interpretation of the Acts in this case advances those legislative goals.

Petitioner would define CBM as a non-constituent of coal and would separate the right to extract CBM from the right to develop the solid fuel components of coal. As proven by the notices of election that Petitioners' predecessors signed, no commercial rights associated with coal were claimed or needed in establishing a homestead. Nor is Petitioners' ownership of CBM now required to remain true to the principle that unreserved valuable resources discovered after patent issuance passed to the agricultural patentee. In sum, the retention of CBM as part of the reserved coal deposits does not interfere with the ex-

pressed federal purpose of permitting agricultural entry onto known coal lands, and it treats the nonmineral patentees in an equitable fashion.

On the other hand, reading the Acts to grant ownership of the CBM to those nonmineral patentees runs directly counter to the Acts' purpose of fostering future coal development under the federal coal lands laws. The Acts were not intended to permit the entryman "to acquire any right whatever in the coal under the surface of the ground he settles upon . . . ." 45 CONG. REC. 6154 (1910) (statement of Rep. Butler). Nor does the language of the Acts suggest that the recipients of the coal deposits would receive something less than the complete coal estates sold under the Coal Lands Sales Act of 1873. Yet by Petitioners' strained reading the nonmineral patentee would control the CBM that must be ventilated for the reserved coal to be mined. In order to fulfill the Acts' purpose of maintaining the coal for development under the coal land laws, the party who in the future acquired the right to develop the coal deposits needed the concurrent right to control the associated CBM in order to mine the coal. Nothing in the language of the Acts or their history suggests that Congress intended that the owner of the coal estate would have to negotiate with the nonmineral patentee for that right, which was absolutely necessary for the development of the coal. Such an absurd—and impractical—construction is not implied, let alone compelled by the language of the Acts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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